UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MAROUS BROTHERS CONSTRUCTION, INC.	
Employer	
and	**Case No. 8-RC-16401**
BRICKLAYERS AND ALLIED CRAFTWORKERS Local Union No. 16	
Petitioner	
OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 404	
Intervenor	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[1]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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[1] The Petitioner, the Intervenor and the Employer filed post-hearing briefs that have been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer, whose name appears as amended at hearing, is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

> *All full-time and regular part-time employees of the Employer engaged in cement mason work within the State of Ohio, including journeymen and apprentices, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.*

There are approximately ten employees in the unit found appropriate herein.

I. The Issues

There are two primary issues to be determined in this representational proceeding. First, is the Employer a party to any Section 9(a) contracts that present a bar to the instant proceeding. The Intervenor contends that its 1997 contract with the Employer acts as a bar to the instant petition. The window period open at the end of that contract has long since expired. Since neither party gave written notification of the termination of that contract, its terms were automatically renewed and the next window period for filing a representation petition has not yet occurred. The Petitioner argues that the contract between the Employer and the Intervenor contains an inappropriate unit and, therefore, cannot act as a bar to this petition. In addition, the Petitioner contends that when the Employer signed a new voluntary recognition agreement with the Intervenor there was no showing of majority representation and, therefore, that agreement did not establish a Section 9(a) relationship. The Employer takes the position that there is no contract bar to the instant petition.

The second issue is whether the unit must be limited geographically in order to be deemed appropriate. The Petitioner seeks a unit which includes cement masons employed by the Employer regardless of where they are performing work. The Employer asserts that the only appropriate unit would be one limited to the counties where the

Employer has done masonry work, Lake, Geauga and Cuyahoga counties in the State of Ohio. [2]

II. Decision Summary

I find that there is no contract bar to the instant representation proceeding and that the petitioned for unit is appropriate. I shall, therefore, direct an election in that unit.

III. The Facts

The Employer is engaged as a general contractor in the construction industry. In addition, the Employer "self performs" work in various construction trades including cement masonry. The Employer employs a core group of some 250 job site employees, including between six and ten cement masons. [3]

Scott Marous, the Employer's vice president, testified that in 1997 the Employer employed one individual as a cement mason. It appears from record testimony that the employee was a member of the Intervenor. At that time, the Employer signed an "Agreement For Voluntary Recognition" with Operative Plasterer's and Cement Masons' International Association Local No. 404. The terms of the agreement defined the Local's jurisdiction as Cuyahoga County and stated that the Employer recognized the Union

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[2] There was some record testimony regarding the status of Mark Langer and Chad Fleming, cement masons classified by the Employer as "foremen". The record establishes that they earn $1.00 per hour more than other cement masons by virtue of their positions. Marous testified that they work with tools 10% of their work time. There is no other record evidence regarding their specific job duties. Marous also testified but without further details, that Kenny Marous has "day to day" control over the work of the cement masons employed by the Employer.

The record does not establish that Langer and Fleming exercise or possess the indicia of statutory supervisory status and no party has actually asserted that these individuals should be excluded from voting in any election directed herein because they are supervisors as defined in the Act. Accordingly, they are eligible to vote in the election directed herein.

[3] The Employer also employs individuals who perform work as operators, carpenters, drywall finishers, laborers and superintendents.

based upon a showing that it represented a majority of the Employer's unit employees. The parties also signed an "Acceptance of Agreement" binding the Employer to the terms of the Cement Mason's Agreement. That agreement was effective, by its terms, from May 1, 1997 through April 30, 2001 and thereafter from year to year absent written notice by either party served sixty days prior to the expiration date. The record clearly establishes that neither party gave written notification of a desire to terminate the contract.

The individual employed under the terms of that contract worked sporadically for the Employer until some time in 1998. Thereafter, the Employer did not employ any cement masons until sometime in 1999. The record establishes that in 1997 and 1998, the Employer subcontracted cement mason work in Cuyahoga County but did not attempt to adhere the terms of the 1997 Cement Masons Contract, requiring that work be subcontracted to employers signatory to that agreement. There is no record evidence that the Intervenor protested the Employer's actions or took any action to enforce the terms of the contract.

Scott Marous testified that it was not until 1999 that the Employer decided to self perform cement work on a regular basis. The record establishes that the Employer has done most of its cement work within the past year, during which time it has employed an average of six to ten cement finishers on a continuous basis.

On April 5, 1999 the Employer signed an "Agreement For Voluntary Recognition" with the Petitioner which recites that the Employer extended recognition based upon its review of authorization cards signed by a majority of its bargaining unit employees.

The record evidence indicates that since 1999 all of the cement masons employed by the Employer have been members of the Petitioner and that the Employer has paid those employees pursuant to the terms of its agreement with the Petitioner. Marous testified that it is the Employer's practice to take its core cement masons from job to job.

Marous testified that in the past year the bulk of the work performed by those employees took place in Cuyahoga County. There was also some work performed in Lake County. While the Employer generally performs most of its work in Lake and Cuyahoga Counties, it has also worked in Lorain County.

The Employer has also acted as a general contractor on jobs outside the State of Ohio. On those occasions, the Employer sends its own foreman but hires employees locally. None of the core group of employees has ever worked outside the State of Ohio.

On May 14, 2002, the Employer signed an "Acceptance Of Agreement" with the Intervenor, agreeing to be bound to the terms of the Intervenor's current collective bargaining agreement for cement masons employed in Cuyahoga County, Ohio. [4] While the Agreement states that recognition was extended to the Intervenor on the basis of a card check, Scott Marous testified that no evidence of majority support was presented to the Employer. The 2002 Agreement stipulates that the Employer may continue to use current employees represented by the Petitioner in Cuyahoga County provided that the Employer pays the rates of pay set forth in the Intervenor's contract. The Employer agreed to pay fringe benefits for such individuals under its agreement with the Petitioner, which amounts will be forwarded to the Petitioner by the Intervenor. However, working

[4] Marous testified that at the time he signed the agreement the Employer was performing work at a job site in Cleveland, Ohio which was partially funded by the AFL-CIO. He signed the agreement after being pressured by various groups to pass some of the work to members of the Intervenor.

dues would be deducted pursuant to the terms of the Intervenor's agreement and paid to the Intervenor.

There is no record evidence that the Employer employed any members of the Intervenor from about 1998 until 2002. There is no evidence that the Intervenor sought to secure employment for its members for work that the Employer performed in Cuyahoga County until May, 2002 when the new agreement was signed.

Robert Fozio, Director of the Northern Ohio Administrative Council of Bricklayers and Allied Craft Workers, testified that although the Employer's agreement with the Petitioner refers to the Petitioner's "jurisdiction" there are no geographic restrictions on the Petitioner's jurisdiction and, therefore, it can represent the Employer's employees regardless of where they are working. However, under the terms of the current contract with the Contractor's Association, the Petitioner's jurisdiction is Lake, Ashtabula and Geauga counties.

IV. Contract Bar

The Board recently refined the circumstances under which a recognition agreement or contract provision will establish a union's Section 9(a) status. Under the Board's decision in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**, a recognition agreement or contract provision will be independently sufficient to establish a Union's 9(a) status where the language unequivocally indicates that (1) the Union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

With regard to the Employer's 1997 contract with the Intervenor, it appears that the contract language satisfies the above-noted requirements [5]and establishes that in 1997 the Employer had a Section 9(a) relationship with the Intervenor. However, only one individual was ever employed under that contract. From sometime in 1998 until sometime in 1999 the Employer employed no cement masons. From 1999 until 2002 the Employer employed cement masons under the terms of its contract with the Petitioner. While the Employer apparently performed work in Cuyahoga County in 2001, the Intervenor made no apparent effort to enforce the terms of its contract until May, 2002. I find, therefore, that, for all practical purposes, the 1997 contract had lapsed in the minds of both the Employer and the Intervenor. The Board has long held that where the administration of a contract has been abandoned, it cannot automatically renew for contract bar purposes. **Deluxe Metal Furniture Company, 121 NLRB 995 1002 fn. 15 (1958).**

Even assuming that the 1997 contract is still in effect, the Petitioner correctly notes that in order to act as a bar to a representation proceeding, a contract must embrace an appropriate unit. **Appalachian Shale Products Co., 121 NLRB 1160, 1164 (1958)** The Intervenor's contract covers only cement masons working in Cuyahoga County. The record establishes that the Employer's cement masons also perform work in Lake, Ashtabula and Geauga counties. There is no record evidence to establish that cement masons working in Cuyahoga County separately comprise an appropriate unit. Indeed, the evidence establishes that the Employer moves the same group of cement masons

[5] Clearly, the 2002 recognition agreement does not bar these proceedings. The facts establish that at the time that it was entered into all parties were well aware that the Intervenor did not represent a majority of the Employer's cement masons. To the

among its jobs, regardless of the location of the job. I find, therefore, that the Intervenor's contract does not embrace an appropriate unit and cannot serve as a bar to this petition. **Moveable Partitions, Inc., 175 NLRB 915 (1969)**

In addition, I note that since the 1997 contract was limited to work performed within Cuyahoga County, it encompasses only a small portion of the work sought by the Petitioner. That contract does not subsume the petitioned for unit. Therefore, the Intervenor's reliance on **Verkler, Inc.** [6] in support of its contention that the 1997 contract should act as a bar to these proceedings is misplaced. In the cited case the Board clearly noted that in order for the intervenor's contract to act as a bar to the petition, it must have established a Section 9(a) relationship and the contract unit must have subsumed the petitioned for unit. That is not the case here.

I find, therefore, that the 1997 contract does not act as a bar to these proceedings.

V. Unit Scope

In this case the Petitioner seeks a unit with no geographic limitation. The Employer contends that the unit should be limited to Cuyahoga and Lake Counties. The Intervenor contends that an election should be directed only in Lake, Ashtabula and Geauga Counties, carving out Cuyahoga County because it maintains that employees working in Cuyahoga County are already covered by its contract.

Based upon the record evidence establishing this Employer's work practices, I find that the appropriate unit is one which is geographically limited to the State of Ohio.[7] The evidence clearly establishes that the Employer utilizes a core group of cement

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contrary, as recognized by the language of the agreement itself, the Employers employees were members of the Petitioner.

[6] 337 NLRB No. 18 (2001).

masons at all of its jobs. The Employer has performed cement mason work for only a relatively short time. In that time it has worked in Cuyahoga, Lake and Lorain Counties. There is no evidence that it has determined that it will not seek work in other counties as well. However, record testimony revealed that while this Employer has acted as a general contractor outside the State of Ohio, it has never taken any of its core group of employees to those jobs. Rather, it has always hired locally. There is no record evidence to establish that the Employer has ever even contemplated changing that practice.

When the Board has addressed the appropriate geographic scope of construction bargaining units, it has examined (1) whether there is a core group of employees who travel from place to place, and (2) the history of where the core group has worked or reasonably foresees working in the future. **Alley Drywall, Inc., 333 NLRB No. 132 (2001)**; **Oklahoma Installation Co., 305 NLRB 812 (1991).**

As noted above, the record in this case establishes that the Employer conducts its business by using its core group of masonry employees on job sites within the state of Ohio. The record further establishes that the Employer has not employed these masonry employees outside the state of Ohio. Accordingly, I find that the scope of the unit should be limited to the State of Ohio. Such a unit would include all of the Employer's employees performing masonry work who have a continuity of employment with the Employer from job to job. I would also exclude the employees who have worked for the Employer outside the State and do not have a continuity of employment. I believe that this geographical limit comports with the principles expressed in **Alley Drywall** and

[7] I note that the Petitioner indicted its willingness to participate in an election directed in a unit other than that petitioned for.

Oklahoma Installation. I find, therefore, that the geographic scope of the unit is properly limited to the State.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding

the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftworkers Local Union No. 16; or (2) Operative Plasterers and Cement Masons International Association; or (3) Neither.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by August 15, 2002.

Dated at Cleveland, Ohio this 1st day of August 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-1700